

BEFORE THE  
POSTAL REGULATORY COMMISSION  
WASHINGTON, D.C. 20268-0001

STATUTORY REVIEW OF THE SYSTEM FOR  
REGULATING RATES AND CLASSES FOR  
MARKET-DOMINANT PRODUCTS

Docket No. RM2017-3

**OPPOSITION OF THE UNITED STATES POSTAL SERVICE TO  
MOTIONS FOR LATE ACCEPTANCE OF SUPPLEMENTAL COMMENTS**  
(July 13, 2020)<sup>1</sup>

Two overlapping groups of mailing-industry associations have requested leave to file supplemental comments, arguing that the ongoing COVID-19 pandemic offers new reasons to rethink Order No. 5337.<sup>2</sup> Yet the Commission has already considered and rejected the supposedly new arguments in the record of this proceeding, and current circumstances do not affect the basis for those Commission decisions. Because the proffered comments would not materially contribute to the Commission's consideration

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<sup>1</sup> This opposition responds to two motions filed by mailing-industry stakeholders who are, in some cases, identical and, in all cases, closely affiliated. The comments proffered by the two motions cover largely the same subjects. But one motion was filed on July 2 and the other on July 6, one working day later (given the intervening holiday weekend). This opposition responds to both motions. Under the Commission's rules, this opposition is timely as to the July 6 motion but not, technically, as to the July 2 motion. 39 C.F.R. § 3010.160(b). Given the close correspondence in the two motions' substance and timing, the efficiency of a consolidated response, and the lack of prejudice to any party, it would be unfair to disregard this opposition as to the July 2 motion on a technicality. If the Commission deems a partial motion for late acceptance to be necessary in this circumstance, then the Postal Service requests that this footnote serve as such. It should be noted that any putative delay in the filing of this opposition is on the order of two working days and is justified by the circumstances of the motions to which it responds, in contrast to the motions' plea for acceptance of comments that, as discussed herein, could have been filed during the last regular comment period four months ago.

<sup>2</sup> See *generally* Supplemental Comments of MPA—The Association of Magazine Media, the Alliance of Nonprofit Mailers, and the Association for Postal Commerce, PRC Docket No. RM2017-3 (July 2, 2020) [hereinafter "MPA et al. Supplemental Comments"]; Supplemental Comments of the National Postal Policy Council [and 17 Other Mailing-Industry Associations], PRC Docket No. RM2017-3 (July 6, 2020) [hereinafter "NPPC et al. Supplemental Comments"]. MPA and the Association for Postal Commerce signed both sets of proffered comments. Each filing was accompanied by a motion for late acceptance, asserting that the events discussed in the relevant set of proffered comments justifies further consideration.

– and would only stand to delay further action by the Commission in a proceeding that has already spanned nearly four years – the motions for late acceptance pertaining to the proffered comments should be denied, and the comments should not be included in the record.<sup>3</sup>

**I. NOTHING HAS CHANGED TO WARRANT CONSIDERATION OF CARES ACT BORROWING AUTHORITY**

Three months ago, a subset of the current NPPC et al. group asked the Commission to “take official notice of the enactment of” the CARES Act, Pub. L. No. 116-136, Section 6001 of which establishes the potential for the Postal Service to borrow additional amounts from the Treasury Department, subject to Treasury Department agreement (among other conditions).<sup>4</sup> The Commission explicitly rejected the request and indicated that it would consider conducting further inquiries later if it felt that doing so would be necessary.<sup>5</sup> From this, it seemed clear that the Commission regarded itself as capable of monitoring such matters on its own, without the need for repeated submissions. After all, if any circumstances arise that stakeholders might seek to bring to the Commission’s attention, those circumstances would almost certainly be public knowledge and thus already known to the Commission.

Despite the Commission’s order in April, NPPC et al. now bring the exact same

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<sup>3</sup> Because of the posture of this filing (a response to motions), the Postal Service does not now reply to the substance of the proffered comments, except as necessary to demonstrate the inappropriateness of their inclusion in the record. If the Commission grants the motions and admits the proffered comments into the record, then the Postal Service trusts that an appropriate opportunity will be provided for substantive reply.

<sup>4</sup> Comments on Joint Motion to Hold Proceedings in Abeyance, and Request for Official Notice, Request for Issuance of Information Request, and Suggestion of Further Steps, PRC Docket No. RM2017-3 (Mar. 30, 2020), at 1-2.

<sup>5</sup> Order No. 5469, Order Denying Joint Motion to Hold Proceeding in Abeyance, PRC Docket No. RM2017-3 (Apr. 2, 2020), at 3.

request for consideration of Congress's enactment of the CARES Act.<sup>6</sup> NPPC et al. Supplemental Comments at 2, 14-15. Nothing has changed on this front since early April. Despite NPPC et al.'s mischaracterization, the funds authorized by the CARES Act are not immediately "available to the Postal Service" or actually "granted," such as might arguably constitute a "development." *Id.* at 14-15. The Postal Service has not accessed the CARES Act borrowing authority, and the circumstances are no different from the last time the Commission considered this argument. As such, the Commission should again reject this argument.

Even if the latent availability of CARES Act borrowing authority somehow warranted consideration (which the Commission has already flatly rejected), it should not preclude or mitigate reform of the market-dominant ratemaking system, for several reasons. First, the CARES Act borrowing authority is just that: borrowing. If ultimately made accessible to the Postal Service, it would provide an immediate influx of cash with which to pay short-term bills, but that cash would later need to be paid back to the Treasury, with interest. Even (hypothetically) without interest, such reversible cash flows would have no impact on net losses; with interest expense, the net cash flows will be negative and would actually somewhat exacerbate net losses, not mitigate them, during the relevant period. Still less would they do anything to cure the repeated net losses caused by a systemic imbalance between Postal Service revenues and costs that the Commission years ago found to demonstrate the market-dominant ratemaking

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<sup>6</sup> NPPC et al.'s attempt to address their earlier failed attempt only evinces further confusion. Shorn of context, a reader of the relevant footnote might think that NPPC et al. are now drawing the Commission's attention to a "duly enacted change in law" subsequent to the CARES Act, such as might offer a fresh basis to "reassess [the Commission's proposed] regulations" that was not evident as of Order No. 5469. NPPC et al. Supplemental Comments at 14 n.20. Yet no such subsequent legislation exists, and the proffered comments concern the same legislation that was at issue in Order No. 5469.

system's failure. In terms of the rubric adopted by the Commission earlier in this proceeding, any increase in potentially available borrowing authority would, at most, go to the "adjusted operating profit" that the Commission used to measure "short-term financial stability," but it would not affect the net income used to measure "medium-" and "long-term financial stability."<sup>7</sup> Well before the advent of the CARES Act borrowing authority, the Commission found that "short-term financial stability" was not among the market-dominant ratemaking system's statutory deficiencies, and it is not among the problems that the Commission's proposals in Order Nos. 4258 and 5337 have aimed at solving.<sup>8</sup> As such, any increase in borrowing authority or borrowed cash has no bearing on the financial-stability issues currently before the Commission.

Second, by its own terms, the CARES Act borrowing authority can be made available only "if the Postal Service determines that, due to the COVID-19 emergency, the Postal Service will not be able to fund operating expenses without borrowing money." Pub. L. No. 116-136, § 6001(b). As such, the additional borrowing authority is designed to address the impacts of the COVID-19 pandemic on the Postal Service's ability to fund operating expenses; it does nothing to address the market-dominant ratemaking system's inability to adequately fund operating expenses (let alone other elements of financial stability) in the more than thirteen years that the system was in

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<sup>7</sup> See Order No. 4257, Order on the Findings and Determination of the 39 U.S.C. § 3622 Review, PRC Docket No. RM2017-3 (Dec. 1, 2017), at 163-71. Although the Commission still has not addressed certain criticisms of the "short-term stability" concept, see Initial Comments of the United States Postal Service in Response to Order No. 4258, PRC Docket No. RM2017-3 (Mar. 1, 2018) [hereinafter "USPS 2018 Initial Comments"], at 13-20, none of the proffered comments suggest a basis for including borrowing authority in other metrics relevant to Objective 5.

<sup>8</sup> Order No. 4257 at 165; see also Order No. 4258, Notice of Proposed Rulemaking for the System for Regulating Rates and Classes for Market Dominant Products, PRC Docket No. RM2017-3 (Dec. 1, 2017), at 28, 35, 39.

place prior to the start of the pandemic.

In the end, though, an order reforming the market-dominant ratemaking system would merely establish the outer bounds of the Governors' pricing discretion, to be exercised in future price filings and converted into revenue as postage is purchased over time. In contrast to any CARES Act borrowing authority that might eventually be made available, any cash-flow effects from resolution of this proceeding would be neither self-executing nor immediate. Because structural reform of the market-dominant ratemaking system and the potential opportunity for CARES Act borrowing aim at solving different problems and operate on different timelines, the latter provides no reason to defer the former.

## **II. THE PANDEMIC DOES NOT JUSTIFY SUPPLEMENTAL COMMENTS ON DENSITY RATE AUTHORITY**

The collective bulk of the proffered comments is devoted to the assertion that two months of mail-volume data amid the novel coronavirus pandemic constitute a "changed circumstance" meriting reconsideration of the Commission's proposed density rate authority.<sup>9</sup> Yet the substance of the discussion does not justify that proposition.

The movants appear to begin from a fundamental misreading of Order No. 5337. NPPC et al. interpret the proposed density rate authority as aimed at "recover[ing] 'lost' unit contribution per delivery point due to volume declines."<sup>10</sup> From this premise, the movants assume that the density rate authority ought to weight mail volumes by

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<sup>9</sup> See *generally id.*; NPPC et al. Supplemental Comments at 1-14.

<sup>10</sup> NPPC et al. Supplemental Comments at 7 (citing Order No. 5337, Revised Notice of Proposed Rulemaking, PRC Docket No. RM2017-3 (Dec. 5, 2019), at 70) (emphasis added).

revenue or contribution.<sup>11</sup> But this premise is wrong. As the Commission explained on the very page cited by NPPC et al., the density rate authority's aim is not restoration of lost contribution, but adjusting for "[t]he increase in per-unit cost caused by the decline in density."<sup>12</sup> In so stating, the Commission expressly rejected two earlier proposals to base such an adjustment factor on contribution- or revenue-weighted volumes:

[T]he Public Representative's proposal incorporates revenue contribution to institutional costs as a determining factor for additional rate authority. This approach targets a net revenue position rather than focusing solely on uncontrollable cost. By focusing on uncontrollable cost, the Commission's approach preserves the incentives for efficiency created by the price cap. The Public Representative's incorporation of Postal Service revenue, therefore, makes it fundamentally different from the Commission's cost-focused approach. . . .

For volume measurement, the Postal Service uses revenue-weighted volume to capture the change in volume from the preceding year.

The Commission takes a more focused approach by using the decline in density as the basis for increasing price cap authority. The Commission maintains that a focus on revenues does not comport with its goal of compensating the Postal Service for unavoidable increases in unit costs. Compensating for these specific costs maintains the efficiency incentives created by a price cap, whereas those incentives may be weakened when additional rate authority is tied to revenue. Therefore, the Commission's proposal does not weight products by revenue when calculating year-over-year changes in density.<sup>13</sup>

Despite attacking the general idea of density rate authority, it appears that none of the movants discussed this aspect of Order No. 5337 in their regularly-filed comments earlier this year. They certainly could have done so: it is self-evident that a

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<sup>11</sup> *Id.*; MPA et al. Supplemental Comments at 3.

<sup>12</sup> Order No. 5337 at 70 (emphasis added). NPPC et al.'s confusion may stem from the presence of the institutional-cost ratio in the density rate authority formula. That ratio has nothing to do with contribution to institutional cost; rather, it is a proxy for the elasticity of network costs. See Reply Comments of the United States Postal Service in Response to Order No. 5337, PRC Docket No. RM2017-3 (Mar. 4, 2020) [hereinafter "USPS 2020 Reply Comments"], at 34.

<sup>13</sup> Order No. 5337 at 75-77 (footnotes omitted).

volume-only formula will not account for shifts in the mail mix, be they incremental or radical. And it was made expressly evident by the Postal Service and Public Representative's 2018 initial comments, Order No. 5337, and the Public Representative's 2020 initial comments,<sup>14</sup> all of which discussed whether the volume terms of a density rate adjustment should be weighted by revenue or contribution, or not at all. The movants clearly did not lack opportunity to opine on the subject during the last three regular comment periods; for whatever reason, they did not do so. That pandemic-era volume data may have belatedly impressed the issue upon them is not the sort of "changed circumstance" that would warrant submission of supplemental comments at this stage of the proceeding.<sup>15</sup>

In addition to the staleness of the weighting issue, the Commission's proposed rules are intended to address fundamental structural problems with the market-dominant ratemaking system that have been evident for over a decade. In this regard, there is absolutely no basis to conclude that the pandemic will somehow result in a reversal of the financial troubles that have plagued the Postal Service amid the last 13-1/2 years of the current market-dominant ratemaking system. Rather, the Postal Service entered the pandemic in a state of significant financial instability, and market-dominant mail volume declines have substantially accelerated as a result of the pandemic. Therefore, it cannot reasonably be expected that the ratemaking system will suddenly begin to achieve the very objectives that, as the Commission has found, it has

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<sup>14</sup> Comments of the Public Representative on Revised Notice of Proposed Rulemaking, PRC Docket No. RM2017-3 (Feb. 3, 2020), at 14.

<sup>15</sup> To be absolutely clear, the point here is merely that the weighting issue could and should have been addressed in the movants' regular comments. The Postal Service does not take any position in this filing on the merits of Order No. 5337's proposal to use unweighted volumes in the density rate authority formula.

not been achieving (per the standard in 39 U.S.C. § 3622(b)). In no case is there a reason to think that the urgency of reform is past, or that any reasonable expectations about the pandemic warrant further rounds of comment and procedural delay.

### **III. THE MOVANTS CONTINUE TO CONFUSE THE RESPONSIBILITIES OF THE COMMISSION AND THE POSTAL SERVICE GOVERNORS**

At every stage of this proceeding – including in irregular motions and comments – the movants and other mailing-industry stakeholders have persisted in alarmism about the supposed effects of any above-inflation pricing authority resulting from this proceeding; these proffered comments continue that trend.<sup>16</sup> And at every turn, the Postal Service has reminded parties and the Commission of the distinction between price increases, which are statutorily the province of the Postal Service Governors, and pricing authority, the outer bounds of the Governors’ discretion that the Commission establishes in furtherance of the statutory objectives (taking account of various factors).<sup>17</sup>

The Commission’s task here remains what it always has been. It must determine the amount of pricing flexibility that would be sufficient to achieve the statutory criteria. Then, the Governors would fulfill their statutory responsibility to determine, in light of ever-changing market and financial conditions, what price increases may be necessary,

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<sup>16</sup> MPA et al. Supplemental Comments at 8-9 (assuming, without explanation, that “the Postal Service would use fully” any and all above-inflation pricing authority, and lamenting the impact on mailers of “the additional price increases that would be authorized by the Commission’s [other] proposals”); NPPC et al. Supplemental Comments at 8-9, 13 (similar assertions).

<sup>17</sup> Opposition of the United States Postal Service to Joint Motion to Hold Proceeding in Abeyance, PRC Docket No. RM2017-3 (Mar. 30, 2020), at 2 & n.4; Opposition of the United States Postal Service to American Mail Alliance Petition, PRC Docket No. RM2017-3 (Mar. 10, 2020), at 4-5; USPS 2020 Reply Comments at 1, 17-19; Initial Comments of the United States Postal Service in Response to Order No. 5337, PRC Docket No. RM2017-3 (Feb. 3, 2020), at 4, 15 n.5, 68; Reply Comments of the United States Postal Service in Response to Order No. 4258, PRC Docket No. RM2017-3 (Mar. 30, 2018), at 1, 7, 30-33, 113; USPS 2018 Initial Comments at 2-3, 55, 79-80.

and how to balance the mailing industry's short-term interest in price suppression with its long-term interest in a sustainable postal system. The Postal Service stands ready to fulfill its charge. All that remains is for the Commission to consider the comments that were properly submitted consistent with the Commission's scheduling order, and to publish a final rule that corrects the deficiencies of the current system.

Because the proffered comments offer no new, relevant information or perspective that could not have been presented in regular comments, the motions for late acceptance should be denied.

Respectfully submitted,

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